PP

v.

VADIVELU GOPAL

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 45-56-98]
17 MAY 1999

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Analysis of substance suspected to be drugs - Substance homogenised - Whether sample taken from substance representative of whole substance - Substance found in different receptacles analysed separately - Whether at least 10% of substance from each receptacle must be used for purposes of analysis - Whether s. 37(j) Dangerous Drugs Act 1952 only applies where there is no separate analysis of receptacles*

CRIMINAL PROCEDURE: *Police investigation - First information report - Report made by police officer knowing investigation will follow - Whether full and final account of complaint - Whether failure to admit into evidence fatal to prosecution case - Whether adverse inference may be drawn*

EVIDENCE: *Witness - Calling of witness by prosecution - Whether all witnesses must be called - Witnesses not called offered to defence - Whether adverse presumption may be drawn by prosecution's failure to call witnesses*

When the accused was arrested, the police found, in his custody, four packets containing pink substances suspected to be heroin. He was charged under s. 37(da)(iii) Dangerous Drugs Acts 1952 ('the Act'). He pleaded not guilty to the charge and claimed trial. The accused contended that he had given a lift to another person who at the time of arrest had gone to buy some cigarettes and that the drugs belonged to that other person. Apart from his version of events, the accused objected to the admissibility of the chemist's report on the premise that the same was not served upon him contrary to s. 399 of the Criminal Procedure Code. Alternatively, it was argued, even if it was admissible, the chemist cannot complement the evidence of the report by giving oral evidence as was done in the instant case. The accused, relying on s. 37(j) of the Act, also argued that the chemist ought to have analysed at least 10% of the substance. The accused further contended that an adverse inference ought to be drawn against the prosecution for failing to admit the first report filed by the main prosecution witness.

Held:

[1] The chemist's report was not tendered under s. 399 of the Criminal Procedure Code. The chemist gave oral evidence before the court and referred to his report for the purpose of refreshing his memory and as corroboration of his oral evidence.

[2] Section 37(j) of the Act applies only where the substance is contained in a number of receptacles. The section could have been applied in the instant case requiring the chemist to analyse the contents of one packet only, being 25% of the receptacles, and the result identifying the dangerous drug and the percentage derived from the quantitative tests of that one packet is applied to all four packets. However, in this case the chemist had analysed the contents of all the four packets separately.

[3] Where a substance has been homogenised, as in the instant case, it means that all of the substance is the same. In such case, all that is required is to take a quantity of the sample that satisfies the minimum requirement of the particular test procedure.

[4] In this case the first report was made by a police officer who knew that an investigation will follow and that detailed statements would be taken. Thus, the report was not a full and final account of a complaint but it was to commence investigation and later a full statement would be provided. There was no injustice occasioned and the adverse inference under s. 114(g) of the Evidence Act 1950 could not arise because there was no evidence of withholding. Defence counsel had a copy of the report and he used it to cross-examine.

[5] The duty to call necessary witnesses to prove beyond reasonable doubt does not mean that all witnesses must be called. It was unnecessary to have called other witnesses merely because they were there. There is no requirement that any fact needs to be proved by any specific number of witnesses. No adverse presumption may be drawn as there was no withholding since the witnesses were offered at the end of the prosecution case and could have been called by the accused if there was any evidence useful to the defence.

[6] The accused's version of what happened, while theoretically possible, was not, in the particular circumstance of the instant case, credible, believable or probable to raise any reasonable doubts. Having custody, control and the requisite knowledge, the accused was clearly in possession of the dangerous drugs. Since the quantity was 84.7 grams, he is, by s. 37(da)(iii) of the Act, deemed to be trafficking in the said drug until the contrary is proved. The burden that lies upon the accused is to prove the contrary upon a balance of probabilities. This he had clearly failed to do.

[Accused convicted.]

Case(s) referred to:
Chin Khing Siong v. Rex [1952] MLJ 74 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(foll)***
Datuk Tan Leng Teck v. Sarjana Sdn Bhd [1997] 3 CLJ 421 ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(refd)***
Liew Chin Yoong v. PP [1971] 1 MLJ 127 ***(refd)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md A Amin & Anor [1997] 2 CLJ 752 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(foll)***
Munusamy v. PP [1987] 1 CLJ 250 ***(foll)***
Ooi Hock Siong v. PP [1955] MLJ 29 ***(refd)***
Pie B En Chin @ Mohamed Chin v. PP [1983] 1 CLJ 316 ***(refd)***
PP v. Abdul Razak Johari [1990] 2 CLJ 1010 ***(refd)***
PP v. Foong Chee Cheong [1970] 1 MLJ 97 ***(refd)***
PP v. Intrakota Sdn Bhd FTCA 42-40-98 ***(refd)***
PP v. Lai Ching Chong [1997] 1 J Cr 234 ***(refd)***
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410 ***(refd)***
PP v. Lin Lian Chen [1990] 2 CLJ 1020 ***(refd)***
PP v. Mohan Singh Lachman Singh FTCT 45-46-98 ***(refd)***
PP v. Roslim Harun [1993] 3 CLJ 505 ***(refd)***
PP v. Tang Kheng Teong [1997] 4 CLJ 34 ***(refd)***
PP v. Saad Mat Takraw & Anor [1998] 4 JCr 424 ***(refd)***
San Soo Ha v. PP [1968] 1 MLJ 34 ***(refd)***
Saw Thean Teik v. R [1953] MLJ 124 ***(dist)***
Tan Cheng Kooi & Anor v. PP [1972] 2 MLJ 115 ***(refd)***
Teo Thin Chan & Anor v. PP [1957] MLJ 184 ***(refd)***
Tii Chuee Hiang v. PP [1995] 3 CLJ 1 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(i), (iii), 399
Dangerous Drugs Act 1952, ss. 37(da), (iii), (j)
Evidence Act 1950, ss. 91, 92, 114(g), 134, 180

Other source(s) referred to:
Sarkar on Evidence 14th edn 1993, vol 1 p 683, *"First Information"*

For the prosecutor - Evawani Farisyta Mohammed DPP
For the accused - M Sathiaseelan; M/s M Sathia & Assocs

Reported by Izzaty Izzudin

JUDGMENT

Abdul Wahab Patail J:

The Charge

The accused Vadivelu a/l Gopal was charged and tried on the following charge:

> Bahawa kamu pada 22.12.1997 jam lebih kurang 1:00 petang, di kawasan letak kereta di hadapan Blok Utama, Pintu Masuk A Hospital Kuala Lumpur, Kuala Lumpur Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 84.7 gram monoacetylmorphines dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The Prosecution Evidence

Briefly, the prosecution evidence is as follows.

Inspector Wan Azlan bin Hj Mamat (SP3) had received on 22 December 1997 at about 12.15 pm, while in his office, a telephone call in his office informing him of drug-related activities in the compound of the Kuala Lumpur General Hospital (KLGC). He organised, briefed and led an ambush group at 12.30 pm comprising:

Insp. Rajendran a/l Kanasan

Insp. Tansly Mering

Det. Sub-Insp. Syed Ariszuddin bin Syed Kamaruddin

Det/Kpl Harvinder Singh a/l Sapuran Singh

Det/Kpl Romli bin Hassan

Det/Kpl Chang Sing Kong

L/Kpl Ramachandran a/l Elumalay

L/Kpl Ahmad Subari

L/Kpl Doraiyyapa a/l Murgaiyah

At 1pm they took their positions, giving priority to the Main Block Entrance A of the KLGC. At about 1.20pm SP3, from his position in entrance A (as at circle X in exh. P-6A; and circle X in exh. P-7) looking towards the road, saw an Indian man on a motorcycle (exh. P-4A, B & C) approaching, but about 10 meters away he made a U-turn towards the direction he came from and stopped (as at circle M in exh. P-7). He could see the rider was not wearing a helmet, and appeared to be waiting for someone. The motorcycle was a blue Honda EX-4 with registration number WFX 1608.

SP3 then approached the Indian motorcyclist and while doing so signalled to Insp. Rajendran and Det/Kpl Chong Sing Kong to do the same. The latter was by the side of the Indian motorcyclist and informing the Indian motorcyclist they were "police" when SP3 reached about 1 meter from him. The Indian motorcyclist is identified by SP3 as the accused.

According to SP3 the accused struggled as he was being arrested and Det/Kpl Chong Sing Kong put his arms around him. There was a struggle as he was being handcuffed. In the struggle the motorcycle fell over on the ground. Exhibits P-6B and P-6C, being photographs of the place where the motorcycle fell over, showed an oily patch on the road. When SP3 was satisfied Det/Kpl Chong Sing Kong had succeeded to handcuff the accused, SP3 approached the fallen motorcycle:

> Apabila saya pastikan saspek digari, saya menghampiri motosikal yang jatuh tadi dan dapati didalam bakul motosikal ada satu beg plastik berwarna kuning. Kemudian saya ambil beg kuning tersebut dan buka dihadapan saspek dan saksi-saksi polis. Saya dapati didalamnya ada 3 bungkusan keratan akhbar. Pada bungkusan pertama keratan akhbar yang diikat getah didalamnya mengandungi satu paket plastik berisi ketulan dan serbuk warna merah jambu disyaki dadah heroin. Manakala bungkusan kedua juga berikat getah didalamnya mengandungi satu paket plastik berisi ketulan dan serbuk warna merah jambu disyaki dadah heroin. Manakala bungkusan ketiga yang diikat dengan tali berwarna hijau, didalamnya mengandungi dua paket plastik berisi ketulan dan serbuk warna merah jambu disyaki dadah heroin.

The packages of substance suspected to be heroin, together with the accused and other exhibits were brought back to the police station where SP3 locked the packages in a steel cabinet in his office, to which cabinet only he had the keys. He then filed a police report. He continued follow-up investigation. At about 8pm he took out and marked the packages, and prepared an exhibit handing over form (exh. P-3) before handing over the packages to the Investigation Officer, Insp. Chua Beng Keong (SP1) at about 9.30pm. The exhibits that were marked were:

1. A yellow plastic bag (marked A).
2. A newspaper wrapper (marked B) in which was found a plastic packet (marked B1) containing granular and powdery pink substance suspected to be heroin (suspected substance).
3. A newspaper wrapper (marked C) in which was found a plastic packet (marked C1) containing granular and powdery pink substance suspected to be heroin (suspected substance).

4. A newspaper wrapper (marked D) tied with a green string in which was found two plastic packets (marked D1 and D2) containing granular and powdery pink substance suspected to be heroin (suspected substance).

5. A blue Honda EX5 with registration number WFK 1608.

6. A key chain with 6 keys.

7. An Ericsson handphone.

8. A blue safety helmet.

All the exhibits, except the keys and chain and handphone were also marked in red ink with his signature, the date 22 December 1997. These exhibits were identified by SP3.

The Chemical Analysis Of The Suspected Substances.

Insp. Chua Beng Keong (SP1) confirmed receipt of the accused and Dang Wangi Report 31673/97 at about 9pm, and an exhibit handing over form together with exhibits from SP3 at about 9.30pm SP1 marked the exhibits, except the motorcycle and the keys, with the initials "CH", the date "22 December 1997" and the number D/W 31673/97 in black marker ink. He then locked the exhibits other than the motorcycle, in a steel cabinet to which only he had the keys, in his office. He had taken out the exhibits the next day for photographs to be taken. The photographs of the motorcycle, and exhibits were identified and marked ID-4A, B, & C and ID-5 respectively. Then together with SP3, they had proceeded with the photographer to the scene of arrest for photographs (ID-6A, B & C), and to prepare a sketch plan and key (P-7, P-7k).

On 24 December 1997 the exhs. 1-4 described above were handed over by SP1 to C/Insp. Mohd Khalid bin Nordin (SP4) for fingerprints. SP4 confirmed receiving the exhibits. He was unable to obtain useful fingerprints and returned the exhibits. to SP1 on 23 March 1998. The return was confirmed by SP1 who then placed the exhibits in an envelope marked "E" and sealed with the Federation of Malaya Police 24 seal. He then locked the same in his locked steel cabinet.

The next day, 24 March 1998 at about 3pm SP1 handed over the envelope "E" to the chemist Chong Yong Kiong (SP5) at the Chemistry department Petaling Jaya. SP1 received a receipt (exh. P-8) number (PJ)FOR 1996/98-0. SP5 verified the contents of envelope "E" to be as follows:

1. A yellow plastic bag (marked A).

2. A newspaper wrapper (marked B) in which was found a plastic packet (marked B1) containing granular and powdery pink substance suspected to be heroin (suspected substance).

3. A newspaper wrapper (marked C) in which was found a plastic packet (marked C1) containing granular and powdery pink substance suspected to be heroin (suspected substance).

4. A newspaper wrapper (marked D) tied with a green string in which was found two plastic packets (marked D1 and D2) containing granular and powdery pink substance suspected to be heroin (suspected substance).

The exhibits were at all times in his exclusive personal custody. SP5 had weighed and then homogenized the substance suspected to be heroin in the packet marked B1 before proceeding to take samples for a series of qualitative tests which confirmed the presence of monoacetylmorphines. He next conducted quantitative tests using gas chromatography techniques on four measured samples, obtaining the percentage of monoacetylmorphines in the measured sample and by calculation upon the original net weight, obtained the net weight of monoacetylmorphines in packet B1. He did the same with the other packets C1, D1 and D2, and the total weight of monoacetylmorphines in the four packets amounted to 84.7 grams. After completing his analysis he sealed the substance in packets supplied by him and repacked the exhibits in envelope marked "E". He sealed the envelope "E" with the Jabatan Kimia Petaling Jaya 1 seal, before returning it to SP1 on 29 April 1998 at 2.45pm.

At the end of the prosecution case the defence elected to make submissions of no case to answer.

Submissions Under Section 180 Criminal Procedure Code.

The issues taken up in submissions by the defence are as follows.

Objection was made in submissions that the chemist report had not been served upon the accused and was therefore inadmissible under s. 399 of the Criminal Procedure Code (the Code), and alternatively if it was admitted into evidence, the chemist cannot complement the evidence of the report by oral evidence.

Spenser Wilkinson J in *Saw Thean Teik v. R* [1953] MLJ 124, has observed that technically it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence, since that is the best evidence as to what he saw or discovered; and the reports of such witnesses should only be used, if at all, either to refresh memory or as corroboration. This case was followed in *PP v. Lin Lian Chen* [1990] 2 CLJ 1020; [1991] 1 MLJ 316, and *PP v. Lam*

Peng Hoa & Anor [1996] 3 CLJ 747; [1996] 5 MLJ 405. It was submitted that these cases are applicable and are good law because they were distinguished but not overruled in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC.

The chemist report was not tendered under s. 399 of the Code. *PP v. Lam Peng Hoa & Anor* is immediately distinguishable as the report in that case was admitted under s. 399. SP5 had been sworn in and gave oral evidence. He was sworn as a witness and gave oral evidence, referring to and refreshing his memory from the report. In the course of doing so the report was tendered by him. Section 399 envisages the production of the report by another person when the chemist is not available. In *Muhammed Hassan v. PP*, the Federal Court observed:

> Furthermore, we saw nothing improper in the production of the report (exh. P11) by PW3 as maker thereof in the course of his giving evidence in court in this case. ...

I am satisfied that in this case, SP5 gave oral evidence before me, and referred to the report made by him for the purpose of refreshing his memory and as corroboration of his oral evidence. In other words, this case falls squarely within *Muhammed Hassan v. PP.*

It was submitted, relying on s. 37(j) of the Dangerous Drugs Act 1952, that the chemist ought to have analysed at least 10% of the substance.

Section 37(j) provides:

> When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

It is clear that s. 37(j) may be availed of only where the substance is contained in a number of receptacles. The section could have been applied in this case, requiring the chemist thereby to analyse the contents only of one packet, being therefore 25% of the receptacles, and the result identifying the dangerous drug, and the percentage derived from the quantitative tests of that one packet is applied to all four packets. The section has not been relied on in this case because the chemist had in fact analysed separately the contents of all four receptacles, being the four packets of the substance. Some assistance towards understanding the point may be derived from *Leong Bon Huat v. PP* [1993]

3 CLJ 603; [1993] 2 AMR 2123 FC. Although the Federal Court was dealing with cannabis, the observations as to sampling is relevant. In that case the Federal Court refused to determine by specifying any particular percentage, the amount to be used as sample, other than to say that what is required is an "adequate quantity". What is an adequate quantity can only be determined according to the particular circumstances. If a chemical test requires 1 gram in order to give a result, then use of 0.5 gram would not be an adequate quantity. The quantity needed as sample would depend on the particular test or procedure. Modern analytical procedures do not require large quantities to be used up in the process of analysis.

The other and distinct aspect in analysis is that the sample used must be representative, meaning that the sample is a fair representation of the original bulk. This can be achieved by various methods, involving a random sampling method, or by first homogenising the substance before taking the sample. In this case the chemist gave clear evidence that he had homogenised the substance. The evidence of the chemist should be accepted as prima facie evidence unless it is inherently incredible: *Public Prosecutor v. Lam San* [1991] 3 CLJ 2410; [1991] 3 MLJ 426 SC; *Public Prosecutor v. Tang Kheng Teong* [1997] 4 CLJ 34; [1997] 3 MLJ 637 CA. These cases are also authority that there is no necessity for the chemist to show in detail what he did in his laboratory. Further, that the substance was homogenised was not challenged by the defence and must be taken as being accepted: see *Pie B. En. Chin @ Mohamed bin Chin v. PP* [1983] 1 CLJ 316,. Where a substance has been homogenised, it means that all of the substance is the same. In other words, a sample taken from any part of it is identical with any sample from any other part. In such case, all that is required is to take a quantity of sample that satisfies the minimum requirement of the particular test procedure.

It Was Submitted That The Determination Of Quantity Of Dangerous Drug By The Chemist Is Inaccurate Because Of Moisture Absorption.

The chemist had admitted in cross-examination that absorption of moisture by the substance will result in an increase in weight. The implication is that the amount of 84.7 gram is possibly inaccurate. In my considered opinion the submission is superficial. SP5 had given evidence he has taken first the gross weight, removed the substance and then weighed the packet. By subtraction the net weight of the substance in the packet is obtained. SP5 had also stated that he did not merely put back the substance into the packet but tied the packet. He took out the substance for the purpose of homogenising and to take samples. While absorption of moisture is possible, it would be far less than if it was left on an open receptacle all the time. Indeed the issue does not arise because it was not the substance that was weighed, but the packet with the substance inside and unexposed, and after the substance was removed,

it was the packet that was weighed and not the substance directly. The net weight calculated in such manner would not be affected by the absorption of moisture by the exposed substance because the substance itself is not weighed.

Secondly, the samples for quantitative analysis was taken subsequently. It must be remembered that quantitative analysis determines the quantity of monoacetylmorphines in the sample as a percentage, which percentage is used as a multiplier upon the net weight of the substance so as to calculate the amount of monoacetylmorphines in the substance in the particular packet. If the sample has become heavier because of moisture absorption, then the percentage of monoacetylmorphines in the sample falls.

Having considered the question in detail, I am convinced that absorption of moisture, while it may affect the weight of substance absorbing the moisture, firstly does not affect the net weight of the original substance as determined by the chemist, and secondly by affecting the weight of the sample used in the quantitative analysis, it can only result in an error reporting a reduced percentage of the dangerous drug monoacetylmorphines in the sample. Such error results in a lesser amount of monoacetylmorphines shown, and would benefit the accused.

It was submitted the failure of the prosecution to admit the arrest and the police report by SP3 is fatal to the prosecution case which relied solely on the evidence of SP3. Relying upon Tan Cheng Kooi & Anor v. PP [1972] 2 MLJ 115 it was submitted an adverse presumption could be drawn.

While the headnote in *Tan Cheng Kooi & Anor v. PP* [1972] 2 MLJ 115, may suggest that where the case against an accused depended entirely upon the evidence of the complainant, the failure to produce the first information report was fatal, the judgment should not be misunderstood. The complainant in that case was a Chinese, who made his report to a Chinese detective. Yet it was the Malay detective who had been together with that Chinese detective, who was called to give evidence. The failure to produce the first information report is not *per se* fatal. In *Ooi Hock Siong v. PP* [1955] MLJ 29 Spenser-Wilkinson J, while deploring the omission as very serious, dismissed the appeal against conviction. The same judge in *Chin Khing Siong v. Rex* [1952] MLJ 74, held that the failure to produce the first information report raises an adverse presumption under s. 114(g) of the Evidence Act 1950. It was this case that was relied upon in *Tan Cheng Kooi & Anor v. PP*. Section 114(g) is worded in discretionary terms, and is intended as a guide. Whether the presumption is to be drawn would of necessity depend upon the particular facts of the case.

It was conceded by the defence that Dang Wangi Report 31673/97 is not a first information report in the strict sense of the word, but it was the first report filed by SP3. Counsel relied on the following passage in *PP v. Roslim bin Harun* [1993] 3 CLJ 505:

> ... The value of first information report is that it is the first report of an occurrence to the police and as such it is entitled to the most careful consideration by the Courts of law. Its importance lies in the fact that it is presumed to be an untutored, unplanned and un-thought out version of the incident just as it reaches the police ... ... before it could be developed or embellished in any manner ...

Such conclusion was well warranted in the circumstances of the case in *PP v. Roslim bin Harun*. But it must also be recognised that such a conclusion is not necessarily true in every case. The circumstances of each case must be considered carefully, and inferences and conclusions must be based upon those circumstances. In this case the report is made by a police officer. He knows that an investigation will follow when detailed statements would be taken. As such it is not necessary for him to tell the whole of his story in the police report that he files, unlike cases such as sexual offences where a complainant would be at pains to possibly give as much detail of the circumstances as the police officer taking the report is patient enough to take.

In drawing conclusions, one must consider what is being said in court and what was said in the police report. If there is a variation between the two, it is not necessarily true that what is in the police report is the less embellished truth. It is not unknown that embellishments exist in the first information report but that subsequent investigation shows the real fact to be less than that is claimed in the first information report. Evidence tested by cross-examination is more likely to be the less embellished truth. If the oral evidence does not contradict the police report, but gives evidence additional to that in the police report, what is necessary is an explanation. The police report by the police officer is essentially a brief report to record an arrest or to commence investigations. It is therefore a brief report, and is not intended to be the full and final statement of all that had happened. In such a case it cannot be said to have been a contradiction and the court would be wrong to accept only the facts set out in the police report. From my assessment of SP3 as he gave evidence and under cross-examination, I do not find SP3 to be inclined to exaggeration and embellishment, and I would accept the reasonable explanation that the police report is intended to commence formal investigation and is not intended as a full and final report on his part.

Furthermore, no possible prejudice has been occasioned to the defence. A copy of the police report was in the hands of counsel who was able to refer to and quote the same for cross-examination. Counsel could have but did not apply to put the report into evidence as a defence exhibit. There cannot be said to have been any withholding to call into operation s. 114(g) of the Evidence Act.

The Test under s. 180(i) Criminal Procedure Code.

The '*prima facie* case' test at the close of the prosecution case is best stated by Azmi FCJ in *Munusamy v. PP* [1987] 1 CLJ 250; [1987] 1 MLJ 492 FC:

> On the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?

In *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 FC; the approach was further elaborated as follows:

> It would not do any violence to the language to say that the word 'accurate' could mean 'true' in the above quotation. It would also not be off the mark to say the words 'prosecution evidence' in the same quotation refer to the evidence of 'primary facts' mentioned by Lord Diplock who held that the prosecution made out a case by adducing such evidence of primary facts in Haw Tua Tau (at p 51). Such evidence of primary facts could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence, such as death as one of the ingredients in a murder case. Once there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a *prima facie* case is made out. In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence.

Although *Munusamy v. PP* dealt with the previous version of s. 180 of a case which if unrebutted would warrant a conviction, the approach of necessity must be similar in determining, as required by *Dalip Bhagwan Singh v. PP* whether there is a sufficiency of evidence. The only basis a person could be lawfully convicted would be where there is evidence proving beyond reasonable doubt that he had committed the offence with which he is charged. The test to be applied then is whether the prosecution has proved its *prima facie* case against the beyond reasonable doubt standard. A similar conclusion as to the standard of proof applicable in determining whether there is a *prima facie* case was made in *Lt Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md A Amin & Anor* [1997] 2 CLJ 752; [1997] 1 MLJ 562 CA. The real issue at the end of the day is what really is 'a reasonable doubt' in the phrase 'beyond reasonable doubt'. The best explanation is that of Denning J. (as he then was) in *Miller v. Minister of Pensions* [1947] 2 All ER 372, where he explained that 'if it is possible but not in the least probable, then it is not a reasonable doubt'. Thus while certain doubts may theoretically be possible in a given set of facts, the court must ultimately have to decide whether given all the circumstances of the particular case, including the nature of the persons and witnesses involved, it was probable that the theoretically possible doubts did in fact exist in that case. If any is probable, there is a reasonable doubt.

SP3 agreed in cross-examination that the police were all wearing civilian clothing, and some, including SP3 were armed, and the police report lodged by SP3 did not state there was a struggle. While he agreed that it would be important evidence in an investigation, he categorically did not accept the suggestion put to him by the defence that there was no struggle.

It was suggested to SP3 in cross-examination that the accused was not trying to escape. Indeed, cross-examination that SP3 and others were armed and were in civilian clothes suggest the likelihood that there was a struggle and that he was trying to get away. The defence did not suggest in cross-examination that the accused was not trying to get away. The court is mindful of the possibility that a person might want to run away out of fear because the persons seeking to detain him were armed and not in uniform.

The defence suggested that the helmet was not on the motorcycle carrier-basket. This too was categorically denied by SP3 who maintained his testimony and explained further in re-examination that the helmet was in the carrier basket of the motorcycle as described but rolled out when the motorcycle fell over. He agreed that the helmet was not mentioned in the police report. It was suggested for the defence that the area was busy at the time, that the accused was talking to another person at the time.

There is no suggestion in cross-examination that the exhibits, being 1) the yellow plastic bag, 2) the three newspaper wrapped packages, two being tied with rubber bands, and the third with a green plastic string and 3) inside were one sealed plastic packet each in the package held by rubber bands and two sealed plastic packets in a package tied with a green string, all the sealed plastic packages containing granular and powdery pink coloured substance suspected to be heroin, were not found in the carrier basket of the motorcycle the accused was riding.

It is clear the cross-examination was principally a questioning exercise without being an actual cross-examination in the sense of putting the defence case to the witness. The court finds that the witness has answered very candidly and there is no reason to displace the assumption that his evidence is accurate.

In *PP v. Intrakota Sdn Bhd* FTCA 42-40-98 I had occasion to observe that:

> It ought to be remembered also that cross-examination itself is not evidence. The answers from cross-examination is evidence. Cross-examination serves to lay out and test the cross-examining party's argument against the relevant witness of the party that calls him. A failure to cross-examine in the circumstances can amount to an acceptance of the testimony. In *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212, the Federal Court said:

A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* where Haslam J. said at p. 122:

> In Phipson on Evidence 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz, where '...the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, *eg*, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

Similarly in *PP v. Mohan Singh a/l Lachman Singh* FTCT 45-46-98, I had also observed:

The challenge to the evidence of the chemist was not followed up in submissions. His testimony was not shaken. His answers may therefore, for the purposes of a decision under s. 180, be taken as accepted. Questions in cross-examination, by themselves are not evidence, and serves only to lay out the line of defence at the first available opportunity so as to give weight to the defence as *bona fide*. The line must be maintained in submission if it is to be given further consideration. If not maintained in submissions, it may be taken that the line has been, at that stage, abandoned.

There is nothing incredible in the evidence of SP3 that from the vantage point where he was standing and looking towards the approach road, he could see the accused clearly, and that he was not wearing a helmet at the time. That he and two others approached close to the accused was not disputed. Obviously then he could see what he testified to: that the helmet was placed in the carrier-basket of the motorcycle on top of the yellow plastic bag found to contain the dangerous drugs. That the dangerous drugs were in that carrier-basket as described was, as I have observed earlier, not challenged.

Ultimately the factual issue upon which this court must make a finding is whether the accused had possession of the dangerous drug. Having accepted the evidence of SP3 that the yellow plastic bag was in the carrier basket of the motorcycle, with the helmet placed on top of it, the question is what

inference may be drawn from it. It is not improper to take into account that the accused is the owner as well as the rider of the motorcycle. The fact of his ownership of the motorcycle was not challenged. In addition there is also the evidence the motorcycle fell over in the course of making the arrest.

Applying the approach in *Munusamy v. PP* and *Dalip Bhagwan Singh v. PP*, *ie*, in the absence of material and unexplained contradictions in the prosecution evidence, to assume that the evidence of the prosecution witnesses are accurate or truthful, and that such evidence not being incredible in any manner, the court finds that the prosecution, in the language of s. 180(i) of the Criminal Procedure Code, had made out a *prima facie* case against the accused, and accordingly, under s. 180(iii) thereof, the court calls upon the accused to enter on his defence.

The Case For The Defence.

The accused elected to give evidence on oath. The substance of his evidence is that a Malay friend he knew for about three months and whom he only knew by the name 'Klang', whom he met at the mamak stall at Jalan Raja Aziz had asked for a lift to Jalan Pahang to visit his friend. Klang had arrived holding a yellow plastic bag on foot. Klang had asked him to use a short-cut through the General Hospital. Along the way Klang put the yellow bag into the carrier basket of the motor-cycle. He also asked the accused to stop at the hospital because Klang wanted to buy some cigarettes. He was arrested while waiting for Klang to return.

In other words his evidence is that the yellow plastic bag and its contents do not belong to him, but to another to whom he was giving a lift, and he does not know what was in the bag. Indeed, this other person told him it was 'kretek'.

Is this possible, and in the least probable?

It was not disputed that cigarettes could be bought at any number of stalls along Jalan Raja Aziz or Jalan Pahang. It was not necessary to stop at the hospital to buy cigarettes. It is incredible that Klang would have left such valuable amount of the dangerous drug in the carrier-basket of a motorcycle with a friend who does not know anything about him other than the name 'Klang' and occasionally work together to 'tarik kereta'. If Klang was riding pillion with the accused, he would have been wearing a helmet. A second helmet was not found at the scene of arrest. It would be very inconsistent and unlikely that, if Klang existed, he would have carried the helmet to the shop in the General Hospital but left the yellow plastic bag with the valuable contents with the accused. The absence of a second helmet in these circumstances would lead to the clear inference that the accused was riding alone.

The accused said the Ericsson handphone was not taken at the scene but from his house. He called his mother to testify to this. This issue, however, was not put to SP3 in cross-examination, although SP3 was asked and he agreed that he had gone to the house of the accused and his mother SD2 as part of his follow-up investigations. The accused said that the telephone belonged to his brother, although it was in the accused's name. His brother Gunasegaram a/l Gopal (SD3) gave evidence that two weeks earlier it was passed on to him because the accused could no longer afford to pay the telephone bills. He gave this evidence on Thursday, 6 May 1999 and having completed his evidence in chief, he was cross-examined. Counsel told the court he had no questions in re-examination, and closed the case for the defence. The trial was then adjourned to Monday 10 May 1999 for submissions.

On 10 May 1999 counsel applied to recall SD3 to give further evidence as to the handphone. SD3 explained that although he lived elsewhere, he left the telephone in the accused's house with his mother because he was not allowed to use a handphone in his place of work as it would interfere with sensitive equipment at the hospital. I find this difficult to accept. Merely because the handphone cannot be used does not preclude it being brought but kept switched off. After all, the hospital has no way to prevent visitors and out-patients from bringing handphones when they come to the hospital, and the alternative is to ask them not to use it. When cross-examined:

> Sebab tidak dibenarkan talipon ditempat kerja - tidak pernah gunakan talipon itu langsung?

He replied:

> Saya menghantarkan anak perempuan saya ke rumah ibu saya sebelum saya pergi ke hospital dan selepas saya balik dari kerja, saya akan membawa balik handphone itu dengan saya ke rumah saya sendiri.

To a further question put to him that he never used or carried the handphone, he said he had no telephone in his house and he would use the handphone when he is in his house. There was no re-examination. Curiously, SD1 appeared to show no interest whatsoever as SD3 gave evidence in this case.

This part of SD3's evidence was not given in his original evidence, but appears as an afterthought when the defence case has been closed. His answers in cross-examination does not directly answer the question put to him. He proceeded to give answers he appears to have in his own mind to support his story that the telephone is his, and therefore to support the mother's (SD2) evidence that the handphone was taken from her house and not at the scene where the accused was arrested, and which would in turn challenge the truthfulness of SP3. It is difficult to give much credence to this testimony.

In addition, that a search was conducted in the house of the accused was not put to SP3 in the original cross-examination, but only when SP3 was recalled after the close of the prosecution case for further cross-examination. SP3 gave a clear and categorical answer that he did not agree to the suggestion. The contradiction as to where the handphone was taken from, at the scene of arrest or SD 2's house is so clear and obvious that it would have been taken up when SP3 was cross-examined at first instance, and not when recalled after the close of the prosecution case. Failure to do so at first instance suggests strongly the suggestion is an after thought, for which purpose SD2 and SD3 was called. As with the majority of such stories, the defence slipped up when SD3 failed to corroborate SD2, and when recalled, he betrays himself when his answers in cross-examination did not directly and specifically answer the questions put but seem to proceed to give answers he had in his mind.

SD2 also gave evidence that a set of keys to the motorcycle was taken from her house. That the keys actually produced was not the keys taken from the motorcycle but was from SD 2's house was not raised in the original cross-examination of SP3.

There is no conceivable reason why the police or SP3 would need to lie about the keys and the handphone. They were of little relevance to the arrest and discovery of the dangerous drugs upon the accused. If the keys taken from the motorcycle was lost, there was no need to get another set. A clear explanation that the keys were lost is sufficient.

SD3 gave evidence that he visited the accused some four months after his arrest, when the accused told him about the mamak who he says saw him riding off on the motorcycle with the Malay man, Klang. I note that the request is to call the mamak as a witness. Why not get the mamak to show who the Malay man is to the police? Obviously, just as SD1 showed little interest as SD3 gave evidence, so did SD3 as to any interest with regard to SD 1's request. He not only went a week later, but also did not bother to inform his brother the accused about not finding the mamak and the stall. SD3 obviously did not take his brother seriously about his story.

In cross-examination of SP3 during the prosecution case, it was laid out in cross-examination that the accused was speaking to another person. When he gave evidence, he contradicted the earlier version when he spoke of waiting for Klang who had gone inside to buy cigarettes, when he was arrested.

It is difficult to accord any credibility to the evidence of SD1, SD2 and SD3 because of these contradictions between the line of defence shown in cross-examination of prosecution witnesses and in the later testimony of SD1, and the incremental defence being built up as witnesses such as SP3 and SD3 were

recalled. All these suggests very strongly that the existence of Klang is made up during and after hearing the evidence of the prosecution, when a defence was constructed to put as much distance between the accused and not only the yellow package supposedly carried by a fictitious Klang, but also to challenge the credibility of SP3 through the keys to the motorcycle and the handphone. It is a sad and desperate attempt by family members to save the accused.

The Final Submissions.

In final submissions, the case *PP v. Abdul Razak bin Johari* [1990] 2 CLJ 1010; [1991] 1 MLJ 105 was referred to with regard to the non-production of the first information report. That decision relied upon *Tan Chen Kooi & Anor v. PP* [1972] 2 MLJ 115, *PP v. Foong Chee Cheong* [1970] 1 MLJ 97, and *Teo Thin Chan & Anor v. PP* [1957] MLJ 184. However, having further considered these decisions, I regret that the reports did not disclose the circumstances the first information report was made. A first information report is like any previous statement soon after an event, with the difference that it is written. It has no probative value as to the truth of its contents. There is no requirement that it be a full and final account of the complaint. It is essentially to commence formal investigations, which would either substantiate the complaint or show it is untrue or inaccurate. It is therefore dangerous to put too much weight upon a first information report. It may be a different matter vis-a-vis a complainant's testimony if the first information report purports on its face to be a true, complete and final account of what is alleged to have happened. In this case, SP3 had given evidence the report was to commence investigations, and that he would provide a full statement later. There is no injustice occasioned and the adverse inference under s. 114(g) of the Evidence Act cannot arise because there is no evidence of withholding. Counsel had a copy of it which he used to cross-examine. The cases cited are therefore clearly distinguishable. I accept the failure to record in the first information report details, such as the handphone, the keys, the helmet, struggle or attempt as non-material omissions and not contradictions by SP3 as complainant, and I accept his explanation that these details would be included in a statement he would provide to the investigation. I would conclude in the circumstances these are details he was not reasonably expected to include in the first information report, but is expected to do so in his police statement.

The court draws no conclusion as to whether there was a struggle, merely that the arrest was not voluntary as evidenced by the fact the motorcycle upon which the accused was sitting fell over in the course of arrest. In any case I would not read too much in a struggle or attempt to run away, particularly in cases where the arresting officers are not in uniform and only claim verbally to be police officers. To that extent I agree with *PP v. Lai Ching Chong* [1997] 1 J Cr 234.

As to identification as police officers, it was submitted in the written outline of submission as follows:

> In Police Report, SP3, Insp. Rajendran & D/L/Kpl 109669 Chang who approached the accused together and identified themselves as Police Officers. In oral testimony it was D/L/Kpl 109669 Chang who approached accused first and identified himself as a Police Officer.

Considering the circumstances, I would not put too much upon whether all or only one made the introduction as police officers. SP3 was not cross-examined as to whether Det L/Kpl was the only person who introduced himself as a police officer. SP3 had said:

> Apabila saya hampir kepada sasaran, lebih kurang satu meter, Det L/Kpl 109669 telah berada ditepi saspek, dan memperkenalkan 'Polis" dimana saspek cuba melarikan diri. Pada masa yang sama, Det L/Kpl Chang Sing Kong terus memeluk saspek ...

Counsel cited *PP v. Lee Eng Kooi* [1993] 2 MLJ 322 and *Pavone v. PP* [1986] 2 MLJ 72 in support of the submission that SP3 should not be allowed to explain his failure to include all the various exhibits seized from the accused in his police report, in particular the keys and the handphone. The application of ss. 91 and 92 of the Evidence Act was thoroughly dealt with in *Datuk Tan Leng Teck v. Sarjana Sdn Bhd* [1997] 3 CLJ 421; [1997] 4 MLJ 329 by Augustine Paul JC (as he then was), and I need not repeat the reasoning that the said sections do not apply to police reports. Indeed the relevant section is s. 35 of the Act as an entry taken down by a public servant in the discharge of his official duty, but is not substantive evidence or of the facts contained therein. Such reports may be used by way of previous statement for corroboration or contradiction: see *Sarkar on Evidence* 14th Ed 1993, vol. 1 p. 683 "*First Information*".

It was submitted that the prosecution ought to call Det/Kpl Chang Sing Kong and Insp. Rajendran:

> According to the accused, he clearly disputes this version of SP3 as according to the accused, SP3 only arrived at the scene a while after he had been physically handcuffed by Det L/Kpl 109669 and another unidentified male Malay and followed by the arrival of lnsp Rajendran. It is submitted that this version of the accused especially in relation to the arrival of SP 3 at the scene was not challenged.

The prosecution has the sole discretion as to whom it wants to call as a witness but this discretion is subject to an important fetter. In *Tii Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433 it was held:

> Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt and if in the exercise of its discretion, it fails to fulfill this obligation - which is nothing less than a statutory duty - the accused must be acquitted.

In *Tii Chuee Hiang v. PP* the following from *Seneviratne v. R* [1936] 3 All ER 36 was quoted with approval:

> Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution ...

The duty to call witnesses essential to the unfolding of the narrative, and necessary witnesses to prove beyond all reasonable doubt does not mean that all witnesses must be called, and the evaluation of the prosecution evidence must be evaluated on the basis of the evidence it has adduced. When SP3 was cross-examined, it was not put to him that he did not introduce himself as a 'police'. Nor was it put to SP3 that the accused was already handcuffed when SP3 arrived. Indeed the cross-examination:

Q. Cadang semasa kamu menghampiri OKT dia sedang berbual-bual dengan seorang lelaki Melayu?

J. Tidak setuju. OKT berseorangan pada masa itu.

This argument the accused was already handcuffed when SP3 arrived was not put in the original cross-examination of SP3. Nor was it put to him when he was recalled at the request of the defence. This argument now raised without having been properly laid out in submission carries little if any weight.

In these circumstances it was unnecessary to have called other witnesses merely because they were there. There is no requirement that any fact needs to be proved by any specific number of witnesses: see s. 134 of the Evidence Act 1950. No adverse presumption may be drawn as there is no withholding since these witnesses were offered at the end of the prosecution case, and could have been called by the accused if there was any evidence useful to the defence. The argument was only sprung when the accused gave evidence. This part of the evidence is material not to the finding of the dangerous drugs upon the accused, but only to the question of credibility of SP3. No useful purpose is served by SP3 lying about the sequence of those who arrived upon the accused.

SP3 had also explained while he prepared a search list, it was not completed because the accused refused to sign it. The accused said in evidence that he refused to sign it because the list made out that the handphone was in the

carrier basket of the motorcycle at the time of arrest. As I have dealt with earlier, SP3 was only asked:

Q. Semasa buat tangkapan ada serah senarai bongkar?

J. Tidak ada.

To my mind the question was potentially misleading, but the answer was precise. The accused himself in his testimony said a search list was presented to him after the follow-up search at his house and after he was taken back to the station and questioned. The failure at the end of the day to put into evidence a search-list by itself would not entitle the accused to an acquittal: see *San Soo Ha v. PP* [1968] 1 MLJ 34. However before any inferences may be drawn from the failure to produce and admit a search list into evidence must depend upon the proper cross-examination being laid out against the relevant witness. Such issue raised only after the close of the prosecution case, in the defence case itself, is not a fitting case where an adverse presumption may be drawn. Furthermore there is no withholding of evidence *per se.*

I need not deal with the submissions as to the chemist report in detail since I have already dealt with it sufficiently. *Liew Chin Yoong v. PP* [1971] 1 MLJ 127 supports my view. As I have stated earlier the chemist was giving oral evidence in court using the report only to refresh his memory, and as such Saw Thean *Teik v. R* is distinguishable. I have also dealt with *Leong Bon Huat* [1993] 3 CLJ 603 FC earlier above and it is unnecessary to add further to the matter. *PP v. Saad b Mat Takraw & Anor* [1998] 4 JCr 424, was a cannabis case not dependent on s. 37(j) of the Dangerous Drugs Act, but the dangerous drug involved, being cannabis, was not capable of being homogenised, and an adequate quantity of the plant material ought to be taken in order to arrive at a safely accurate result. As the other factors set out in the outline of submissions, the arguments raised are essentially hypothetical questions. The argument of motivations, risk taking and illogical decisions are matters the accused could have given evidence on but did not, and it is not necessary to dwell upon the matter. Equally, the rhetorical question 'if it wasn't to collect the motorcycle's key, what was the purpose of SP3 and his team's visit to the accused's house on the date of arrest?' SP3 had answered, reasonably and in accord with usual practice in most cases before the courts, that it was part of the follow-up after the arrest. Simply, it is to see the premises he occupies and see whether there is possibility of more of the substance hidden on the premises.

Having considered the evidence adduced as a whole, by the prosecution and the accused, the court finds that the prosecution has proved its case beyond reasonable doubt. The evidence for the defence of the motorcycle keys and the handphone taken from the house and not the scene of arrest, of a Malay

man by name of Klang being with the accused when he arrived at the General Hospital car-park, while theoretically possible, are not in my view in the particular circumstances of this case, credible, believable, or probable as to raise such doubts to reasonable doubts as to the credibility of SP3 and the existence of Klang alleged to be the person carrying the dangerous drugs found. I have asked myself the question another way: even if I do not believe the defence story, does it raise a reasonable doubt nevertheless? For all of these same reasons, the answer is while doubts are hypothetically or theoretically possible, it is in the particular circumstances of this case so remote and improbable that no reasonable person would entertain the doubt in his mind in making a decision.

The dangerous drugs are sealed in four clear plastic packets where the contents are obvious. These packets were wrapped in unsealed paper packages tied only with rubber bands and string. All these were placed in a yellow plastic bag. The yellow plastic bag is the only item in the carrier basket of the motorcycle, covered only by the accused's helmet. The accused cannot be unaware of it. Being alone and riding his own motorcycle, he cannot be said to be not in custody and control. He was observed as if waiting for someone to arrive. In other words, an encounter was pre-planned. Although his reactions to arrest may be equivocal, the allegation by him that the package belonged to a person riding pillion with him, who had asked him for a lift, and who had gone into the General Hospital shop to buy cigarettes were clearly false since SP3 never saw any such person riding with the accused as he arrived, turned around and stopped. A search by two policemen inside did not produce any such man. The false answer seeking to attribute ownership, possession or knowledge upon a non-existent person speaks louder than any attempt to run away to show that he knows the nature of the dangerous drugs in the yellow plastic bag. Having custody, control and the requisite knowledge, he is clearly in possession of the dangerous drugs. Since the quantity is 84.7 grams, he is by s. 37(da)(iii) of the Dangerous Drugs Act 1952 deemed, until the contrary is proved, to be trafficking in the said drug. The burden that lies upon the accused is to prove the contrary upon a balance of probabilities. This he has clearly failed to do.